ZAINAL BIN HASHIM v. MOHAMED HANIFF BIN OMAR & ANOR.

[O.C.J. (Abdul Hamid J.) March 21, 1975]

[Kuala Lumpur — Civil Suit No. 731 of 1972]

Administrative law — Delegation of powers of Police Force Commission — Power of dismissal of constables delegated to Chief Police Officer — Power of appointment not delegated — Dismissal void and of no effect — Federal Constitution, art. 135(1).

Constitutional Law — Police Force Commission — Delegation of Powers — Power of dismissal delegated to Chief Police Officer — Power of appointment not delegated — Federal Constitution, art. 135(1).

In this case the plaintiff who was a police constable had been convicted on his plea of guilty on a charge under section 353 of the Penal Code. Disciplinary proceedings were taken against him and eventually he was dismissed by the Chief Police Officer, Selangor. The power to dismiss constables had been delegated by the Police Force Commission to the Chief Police Officer. Power to appoint a police constable had not been so delegated to the Chief Police Officer. The plaintiff applied for a declaration *inter alia* that his dismissal was void and inoperative.

Held: the Chief Police Officer was not delegated with the power to appoint but merely with the power to dismiss. In the absence of the power to appoint, the dismissal by the Chief Police Officer was therefore in violation of Article 135(1) of the Federal Constitution and therefore void.

Case referred to:-

(1) *The Government of Malaysia* v. *Iznan bin Osman* [1975] 2 M.L.J. 61.

CIVIL SUIT.

G. T. Rajan for the plaintiff.

Abu Talib bin Othman (Senior Federal Counsel) for the first and second defendants.

Abdul Hamid J.: In an action against the Government of Malaysia, Zainal bin Hashim the plaintiff is asking the court to make an Order —

(a) declaring that his dismissal from the Royal Malaysian Police Force, effective on December 16, 1971, was void and inoperative and of no effect and that he is still a member of the Royal Malaysian Police Force; and

(b) that an account be taken of the salary and emoluments due to him from the date of such wrongful dismissal to the date of reinstatement.

The plaintiff joined the Service in the Police Force in 1962. On April 29, 1971 he was charged in the Magistrate's Court, Kajang for an offence under section 353 of the Penal Code for which he pleaded guilty. He was discharged conditionally upon his entering into a bond in the sum of $500 for a period of two years under section 173A(ii)(b) of the Criminal Procedure Code.

At the material time the plaintiff was serving in Kajang as police constable No. 31209. On December 20, 1971 Mr. S.W. Moreira, Deputy Chief Police Officer, Selangor in his letter (page 2 AB) addressed to and served upon the plaintiff, suspended the plaintiff's service with effect from December 16, 1971 the date the plaintiff was found guilty in the Magistrate's Court at Kajang. Mr. Moreira who wrote for and on behalf of the Chief Police Officer, Selangor stated that as the plaintiff was found guilty of a charge under section 353 of the Penal Code at the Lower Court, Kajang on December 16th 1971 and was ordered to execute a bond in the sum of $500 to be of good behaviour for two years under section 173A of the Criminal Procedure Code, he (plaintiff) was therefore suspended from duties without pay with effect from December 16, 1971.

At the time the plaintiff was suspended from Service he was on the Permanent and Pensionable Establishment drawing a salary of $230 per month with $10 increment per annum and a Tamil Language Allowance of $15 per month.

Subsequent to the letter of suspension the plaintiff was, on December 28, 1971 served with a dismissal notice signed by the Chief Police Officer, Selangor (page 3 AB) which reads as follows —

"I am hereby directed to inform you that I intend to take an action to dismiss you from the Royal Malaysian Police Force for having been found guilty of a charge at the Lower Court, Kajang on December 16, 1971 and for having been ordered to execute a bond of $500 to be of good behaviour for a period of 2 years under section 173A(ii)(b) Criminal Procedure Code.

You are therefore given the opportunity to make any representation in respect of the above matter within a period of 14 days with effect from the date of receipt of this letter.

Your representation should be in writing and addressed to me.

Sgd. Mohd. Haniff bin Omar
Chief Police Officer,
Selangor."

On December 30, 1971 plaintiff in a letter addressed to the Chief Police Officer, Selangor made a representation stating, among other things, that with reference to the Kajang Magistrate's Court case he was only ordered to execute a bond to be of good behaviour for 2 years without any conviction being recorded. The plaintiff admitted making a mistake but promised that he would not repeat the same offence. He urged the Chief Police Officer, Selangor to show mercy and kind consideration.

On January 20, 1972 Mr. Moreira signing for and on behalf of the Chief Police Officer, Selangor wrote to the plaintiff stating that pursuant to the letter dated December 28, 1971 and after considering the representation and the circumstances surrounding the commission of the offence the plaintiff was dismissed with effect from December 16, 1971.

The plaintiff was also informed that he could make representation in respect of the matter to the Inspector-General of Police within 10 days from the date of the receipt of the letter.

Two days later on January 22, 1972 plaintiff wrote a letter addressed to the Inspector-General of Police appealing that he be reinstated in Service. In this letter the plaintiff, appealed that the order for dismissal be reconsidered on compassionate grounds.

On February 7, 1972 the Inspector-General of Police wrote a letter to the plaintiff stating that his appeal had been given careful consideration and that having regard to the evidence adduced and from the Record of Service he was not fit to continue in the Service and that the order of dismissal made against him by the Chief Police Officer, Selangor was fair and appropriate. In the circumstances, the plaintiff's representation was rejected and the order of dismissal was confirmed.

On July 21, 1972 the solicitors for the plaintiff served a notice on the Inspector-General of Police asking him to reinstate the plaintiff maintaining that the dismissal of the plaintiff from the Service was irregular and wrong in law and that the plaintiff was denied natural justice at all stages leading to his dismissal. A reply was sent to the solicitors by the Inspector-General of Police stating that the plaintiff was properly dismissed in accordance with the law and that the Inspector-General of Police had no intention to reinstate the plaintiff.

It is the contention of the defendants that the Chief Police Officer, Selangor acted properly and within the powers conferred by the Police Force Commission under an Instrument of Delegation of Powers and Duties (Exhibit D1) (I shall hereinafter call "the instrument"). For purposes of this case the relevant clauses of the instrument are as follows —

"(i) *Composition of Boards:*

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(ii) *Appointment, confirmation and emplacement on the Permanent or Pensionable Establishment:*

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(iii) *Promotion:*

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(iv) *Transfer:*

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(v) *Exercise of disciplinary Control:*

In accordance with Article 140(6)(b) of the Federal Constitution the Police Force Commission hereby delegates its functions relating to exercise of disciplinary control, so as to be exercised by the members of the police force or boards of police officers, to the extent set forth in the Fourth Schedule hereto. The Fifth Schedule, the relevant part of which reads —

FIFTH SCHEDULE

Discipline

The functions of the Police Force Commission relating to discipline (including functions vested in a disciplinary authority and which have not been delegated elsewhere in this or any other Instrument of Delegation) under Article 140(1) of the Federal Constitution, or under any other written law, subsidiary legislation or administrative instructions of Government, shall be exercised by the Inspector-General of Police, subject to the following provisos:—

Senior Police Officers

(i) .....

(ii) .....

Junior Police Officers

(iii) .....

(iv) .....

Constables

(v) the power to award disciplinary punishment of dismissal may be exercised by a senior police officer of and above the rank of Senior Assistant Commissioner of Police or a Chief Police Officer, in respect of constables;

(vi) ....."

Now, one of the plaintiff's contentions is that the Chief Police Officer, Selangor had no power of dismissal. The plaintiff's argument was, however, directed mainly towards the question of the validity of the delegation, namely that the delegation of powers by the Police Force Commission must be done under and in accordance with the Delegation of Powers Ordinance, 1956.

For purposes of this particular case I do not propose to deal with the various grounds raised by the plaintiff. Suffice if I say that in the light of paragraph 8 of the statement of claim, the question of the Chief Police Officer's power of dismissal is directly in issue. I would therefore proceed to determine, first of all, whether under the Instrument of Delegation, the Chief Police Officer had, in law, been properly vested with the power of dismissal. In determining the question, I shall have regard to Article 135 of the Constitution, which, I think, is very pertinent to the issue under consideration even though counsel for the plaintiff had not made any submission on this point. To my mind, Article 135 of the Federal Constitution is very relevant when considering the validity of a power of dismissal delegated under Article 140.

Article 135(1) of the Constitution clearly provides that no member of any of the services mentioned in certain paragraphs — of Clause (1) of Article 132, and this includes the Police Force, shall be dismissed by a authority subordinate to that which, at the time of dismissal, has power to appoint a member of that service of equal rank. In the instant case the power of dismissal over constables was delegated by the Police Force Commission to the Chief Police Officer in accordance with Article 140(6)(b) of the Federal Constitution. However, the Police Force Commission delegated in the same instrument the power to appoint constables to the Inspector-General of Police. The Second Schedule of the instrument reads as follows —

"Appointments

The functions of the Police Force Commission relating to appointments (including functions vested in an appointing authority) under Article 140(1) of the Federal Constitution, or under any other written law, subsidiary legislation or administrative instruction of Government, shall be exercised by:—

(i) ...

(ii) The Inspector-General of Police in respect of ... constables."

It is therefore abundantly clear that the Chief Police Officer, Selangor was not delegated with the power to appoint but merely with the power of dismissal. The Federal Court judgment in the case of *The Government of Malaysia* v. *Iznan bin Osman*[1] is, I think, directly in point. In the course of his judgment His Lordship Suffian L.P. said —

"The defendant Government sought to prove that the P.F.C. had delegated the power to dismiss constables to the C.P.O. The defendant should also have sought to prove that the P.F.C. have also delegated to the C.P.O. power to appoint a constable."

Now, speaking of Article 135(1) of the Federal Constitution, His Lordship had this to say —

"If the Commission delegate the power to appoint and dismiss a constable to a C.P.O., the C.P.O. may appoint *and* dismiss.

If they delegate only the power to dismiss, not power to appoint, the C.P.O. cannot dismiss, because he is subordinate to the P.F.C. and article 135(1) says that no constable may be dismissed by an authority subordinate to the authority which, at the time of the dismissal, has power to appoint a constable.

On the contrary if federal law or regulations made by the Yang Dipertuan Agung under clause (5A) of article 144 empower a C.P.O. to dismiss a constable, the C.P.O. may validly dismiss him, even if the C.P.O. is not empowered to appoint a constable. The words 'notwithstanding the provisions of clause (1) of article 135' in that clause are the authority for that proposition. But for these words, the C.P.O. may not validly dismiss unless he is empowered to appoint also.

These words appear also in clause (5A)(i) of article 144, so that a board appointed by the Yang Dipertuan Agung under that clause may validly dismiss a member of the service who is within the jurisdiction of the P.S.C. or the Education Service Commission, though the board is regarded as subordinate to the P.S.C. or E.S.C. and has no power to appoint an officer of equal rank."

On the authority of the case I have just cited, it is my judgment that, in the absence of the power to appoint, the purported dismissal of the plaintiff by the Chief Police Officer, Selangor was therefore in violation of Article 135(1) of the Constitution and was therefore void.

In consideration the plaintiff's claim must necessarily succeed. As the purported dismissal of the plaintiff was void and of no effect, it is my judgment that the plaintiff has to be reinstated effective from the date of the purported date of dismissal. He shall be entitled to the salaries and emoluments due to him from the date of the reinstatement.

The Government of Malaysia shall pay the plaintiff's costs.

Order accordingly.

Solicitors: *G. T. Rajan.*

MADHAVAN NAIR & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) April 15, 1975]
[Kuala Lumpur — Miscellaneous Criminal Application No. 33 of 1974]

Constitutional Law — Reference to High Court on effect of provision of Constitution — Condition imposed on licence for public meeting — Ban on reference to sensitive issue — Whether infringing right of free speech — Validity of condition — Interpretation Act, 1967, s. 40 — Police Act 1967, s. 27 — Federal Constitution, art. 10.

Police — Powers of police to impose condition on licence for public meeting — Police Act, 1967, s. 27.

Courts of Judicature Act, 1964, s. 30 — Construction of.

The applicants had been charged with contravention of a condition of a licence to convene a public meeting, that is, that no reference should be made to the results of the M.C.E. examination and the status of Bahasa Malaysia as the national language of the Federation. Counsel for the applicants had argued that the condition imposed was *ultra vires* article 10 of the Federal Constitution. The learned magistrate decided to refer the matter to the High Court.

Held: (1) if the condition imposed had contravened article 10 of the Federal Constitution, it was clear that no such condition could be imposed;

(2) in this case, however, the condition was not in contravention of article 10 of the Federal Constitution and therefore the police had powers under section 27 of the Police Act, 1967, to impose the condition.

Cases referred to:-

(1) *In re Article 143, Constitution of India* A.I.R. 1951 S.C. 332.

(2) *Harishankar Bagla & Anor.* v. *State of Madhya Pradesh* A.I.R. 1955 S.C. 380.

(3) *R.* v. *Comptroller of Patents, Ex parte Bayer Products Ltd.* [1941] 2 K.B. 306.

(4) *Francis* v. *Chief of Police* [1973] A.C. 761.

CRIMINAL REFERENCE.

Karpal Singh for the applicants.

Lamin bin Haji Yunus (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: This is a reference by the learned magistrate at Petaling Jaya to the High Court under section 30(2) of the Courts of Judicature Act No. 7 of 1964 to determine the following question: —

"Whether the officer-in-charge of Police District may by virtue of the powers conferred upon him by section 27 of the Police Act 41/67 to issue licences for public performances, impose a condition on the said licence which contravenes Article 10 of the Federal Constitution of Malaysia."

She came to this idea in the course of the trial when learned counsel for the accused suddenly submitted that the condition that was imposed in the permit was *ultra vires* Article 10 and that the matter should be referred to the High Court to decide whether it was in fact *ultra vires*. She then decided to transfer the proceedings to the High Court for the High Court to decide.

Section 30 of the Courts of Judicature Act reads as follows: —

"30. (1) Where in any proceedings in any Subordinate Court any question arises as to the effect of any provision of the Constitution the presiding officer of such court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to a High Court under this section shall be examined by a judge of such High Court and where such judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 48 of this Act as if it were a case before him in the original jurisdiction of the High Court in which such a question had arisen.

(3) Subsections (1) and (2) of this section shall be deemed to be rules of court for purposes of Clause (2) of Article 128 of the Constitution."

On the proper construction of this section it seems to me with respect that when any question as to the effect of any provision of the Constitution arises in a trial in any Subordinate Court the presiding officer, the magistrate or the president, has a discretion to stay the proceedings and transmit the record to the High Court. The purpose of the transmission to the High Court is by subsection (2) to enable a judge of that court to examine the proceedings and it is only when he considers that a decision of the question is necessary for determination of the proceedings that he deals with the case in accordance with section 48, that is, he deals with it in the original jurisdiction of the High Court, stays the proceedings and awaits a decision of the question by the Federal Court.

I do not however think that any useful purpose would be served by remitting the case to the learned magistrate to follow the procedure laid down and I accept the suggestion of learned counsel for the applicants to consider the matter.